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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1272

G.I. DISTRIBUTORS, INC., ALVIN DRUSS and IRVING HERMAN,

Petitioners,

against

RICHARD H. KUH, in his capacity as District Attorney of New York County,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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Preliminary Statement

This brief is in response to a petition for a writ of certiorari seeking review of a judgment of the United States Court of Appeals for the Second Circuit (Friendly, C.J., Lumbard, J., with Feinberg, J., dissenting), entered December 20, 1973, which affirmed, following a remand by this Court, its judgment entered November 14, 1972, reversing a judgment of the United States District Court for the

Southern District of New York (WEINFELD, J.), entered January 19, 1972.

The District Court judgment had ordered respondent's predecessor, Frank S. Hogan, to return to petitioners 19,000 copies of 55 magazines which had been removed from petitioners' warehouse pursuant to a search warrant issued by a judge of the Criminal Court of the City of New York, after his determination in an adversary hearing that there was probable cause to believe the magazines obscene.*

Question Presented

Whether a violation of the First Amendment occurs where undistributed magazines are restrained overnight in a wholesaler's warehouse pending the outcome of an adversary hearing held the following morning, after which probable obscenity of the magazines is found.

Statement of the Case

The Overnight Quarantine

G.I. Distributors, Inc. is a wholesale distributor of what it terms "sexually oriented" books and magazines; Alvin Druss and Irving Herman are officers of the corporation.

While executing a search warrant on January 6, 1972 for business records of G.I. Distributors (hereinafter G.I.) which it was believed would contain evidence of G.I.'s unlawful wholesale promotion of obscenity, a class D felony

* On February 13, 1974, Richard H. Kuh succeeded Frank S. Hogan as the District Attorney of New York County. Michael Codd had previously succeeded Patrick Murphy as Police Commissioner of the City of New York.

under New York Penal Law §235.06, and for copies of magazines theretofore deemed obscene by judges of the New York City Criminal Court, police discovered in G.I.'s Long Island warehouse 19,000 copies of the magazines they were seeking.[1] Since the magazines were sought as evidence of G.I.'s felonious wholesale promotion of obscenity, the 19,000 copies would constitute damaging proof of the corporation's unlawful wholesaling.

The search was being conducted with the supervision of the District Attorney of New York County, and immediately upon the discovery of the large cache of magazines it was understood that the decision of this Court in *A Quantity of Books* v. *Kansas* [378 U.S. 205 (1964)] appeared to bar a long-term restraint of such a vast number of magazines without there being accorded an adversary hearing to their owners. Thus G.I. and their attorney were then notified that an adversary hearing into the probable obscenity of the magazines would be held the following morning in the New York City Criminal Court and, pursuant to the search warrant, 6 copies of each of the 55 magazines were seized as specimens.

Fearful that a huge volume of hard-core pornography would be spirited away by petitioners—themselves charged with felonies[2]—before the hearing could be held the follow-

1. The original appeal before the Second Circuit did not concern the District Court's rulings regarding the seized business records and 330 specimen magazines (6 copies each of the 55 magazines). For the sake of conciseness, only the facts relating to the 19,000 magazines are set forth herein; many of the facts not applicable to the appeal can be found in the opinion of the District Court, which has been reproduced in petitioners' brief and is reported at 336 F.Supp. 1036 (S.D. N.Y. 1972).

2. On the night of January 6th petitioners Alvin Druss and Irving Herman were arrested and charged with the felonious wholesale promotion of obscenity; they were subsequently indicted on that charge.

ing morning, the law enforcement authorities quarantined the 19,000 magazines overnight by stationing a police officer on the warehouse premises overnight to ensure against a sudden removal of the magazines which would render the next day's hearing largely academic. This course was adopted, rather than removing the magazines from the warehouse, so as to impose the least disruption of G.I.'s operations in the event that the magazines or some of them were found not to be obscene in the adversary hearing.

The Adversary Hearing

The following morning, January 7th, an adversary hearing was held before Judge Bernard Moldow in the New York City Criminal Court. Petitioners' attorney, Herald Price Fahringer, Esq., participated in this hearing, arguing at length that the magazines were not obscene.[3] After examining each of the magazines and hearing the contentions of both sides, Judge Moldow concluded that there was probable cause to believe every one of them was obscene. He then issued a search warrant again authorizing the seizure of the remaining 19,000 copies of the 55 magazines he had examined. The warrant was executed that same day, and the magazines were taken as evidence in the felony prosecutions then pending against petitioners G.I., Herman and Druss.

The Federal Action

On January 10th petitioners commenced an action in the United States District Court for the Southern District of

3. Petitioners' attorney refused to stipulate to the inclusion of the minutes of the adversary hearing as an exhibit on the appeal in the Second Circuit. Thus, details regarding the hearing are not part of the record sought to be certified.

New York, naming former District Attorney Hogan and former New York City Police Commissioner Patrick Murphy as defendants and seeking, *inter alia*, the return of the 19,000 magazines and other property taken from them. At no time prior to their bringing of the federal action had petitioners sought to avail themselves of the identical injunctive relief open to them in the courts of New York State.

The District Court concluded that the overnight restraint of the magazines had constituted a seizure, and reasoned that *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2d Cir. 1969), *cert. denied* 397 U.S. 920 (1970), had been violated because the seizure had preceded the next day's hearing rather than *vice versa*. The District Attorney was directed to return the magazines; the order also enjoined petitioners "as a condition of the granting of their application * * * from disposing of any of the * * * material directed to be returned, so that they will be available for subpoena in the State prosecution."

Stays of the District Court order pending appeal were denied by the Second Circuit on January 26th, and by Mr. Justice Blackmun on January 28th.

The Original Decision of the Court Below

After full oral argument the Court of Appeals on November 14, 1972 issued a decision reversing the judgment of the District Court. The opinion of the court was written by Judge Lumbard, with Chief Judge Friendly concurring, and Judge Feinberg dissenting in a separate opinion. Reported at 469 F.2d 752, the decision is reproduced in the brief for petitioners.

Stating that its decision was "a limited one," and that "[b]ecause of the incomplete record on appeal, we have no basis on which to question adequacy of the hearing," the court stressed that it was deciding "only that the brief and insubstantial prior restraint which occurred here, followed a few hours later by a hearing, notice of which has been given to those in possession of the alleged obscene publications, does not violate the First Amendment."

In reaching this result the court concluded that the overnight quarantine "did not present the interference condemned in *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961) and *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964)," and that "[n]othing our decisions in *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293 (2d Cir. 1970) or *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2d Cir. 1969) is inconsistent with the result we reach here."

In reversing the lower court the Court of Appeals did not direct it to reinstate the District Attorney's possession of the 19,000 magazines. In fact, the Court of Appeals noted (opinion, fn. 7) that "[a] further question is whether the magazines returned to the appellee [petitioners] pursuant to the district court's order have now been distributed to retailers, thus rendering the appeal moot * * *," and that "thus there is a live issue whether appellant can retake them pursuant to the state judge's order."[4]

The dissenting opinion of Judge Feinberg conceded that "[a]s a matter of common sense, there is a good deal of

4. The Second Circuit stayed the issuance of its original mandate pending this Court's disposition of the original petition for certiorari, and respondent was precluded from applying to the District Court for an order reinstating respondent's custody of the magazines in controversy.

merit in the majority's position that the prior restraint here was so 'brief and insubstantial' that it did not 'violate the First Amendment,' " but opted for the requirement of a *prior* adversary hearing in all cases because "[t]his furnishes a clear, easily applied test of constitutional validity * * *."

The Decision After Remand

Following the Court of Appeals' original decision, petitioners applied to this Court for a writ of certiorari to review that judgment (No. 72-872). In a memorandum dated June 25, 1973 (and reproduced in petitioners' brief as Appendix A), this Court granted the petition for certiorari, vacated the Court of Appeals' judgment, and remanded the case to the Court of Appeals for further consideration in light of the eight obscenity decisions handed down by this Court in June of 1973.

After the remand the case was reconsidered by the Court of Appeals upon new briefs submitted by the parties and without oral argument. On December 20, 1973, the Court issued a decision affirming its original judgment (reproduced in petitioners' brief as Appendix B and as yet unreported). It held that "Having given careful consideration to these decisions [this Court's June 1973 obscenity decisions], we conclude that they do not require us to alter our prior opinion."

POINT

The issue tendered by petitioners is insubstantial, has been mooted by the subsequent distribution of the subject magazines and dismissal of the indictments against petitioners, and in any event was decided correctly by the court below.

The Controversy Is Academic

Upon reconsideration following this Court's remand of the case, the Court of Appeals was informed that the subject matter of the controversy—the 19,000 magazines—had been distributed. Custody of the magazines had been restored to petitioners following the District Court decision, and was not transferred to the District Attorney after the original reversal by the Court of Appeals, which stayed its mandate pending disposition of the original petition for certiorari. Sometime between the issuance of the District Court order and the Court of Appeals' decision after remand, the magazines were distributed by petitioners and now are irretrievably dispersed in the national marketplace:

> "As to the 19,000 magazines, we have recently been advised by the parties that they were shipped back to the suppliers of G.I. Distributors after the District Court held the police actions unconstitutional and ordered the magazines returned to G.I. Distributors." *G.I. Distributors* v. *Murphy*, —— F.2d ——, fn. 2 (2d Cir. 1973).

Thus, the entire *res* of the controversy can no longer be made subject to this Court's determination, and the Court is asked by petitioners to decide the tendered issue *in vacuo*.

Moreover, the State indictment against petitioners which had charged them with felonious wholesale promotion of obscenity (Indictment No. 492/72, New York County) was dismissed on January 28, 1974. There remains no pending criminal prosecution in which the 19,000 magazines, originally seized as evidence of petitioners' wholesale promotion of obscene materials, may be introduced.

The Issue Is Insubstantial

Whether an adversary hearing must *precede* a restraint of possibly protected expressive matter in every instance or whether, as the court below originally held, the hearing may follow a restraint that is "brief and insubstantial," is not "an important question of federal law" (Supreme Court Rule 19), but rather an issue of little significance outside the confines of the instant case.[5] It is an issue arising from unique facts unlikely to reoccur (the overnight quarantine of magazines in a wholesaler's warehouse in anticipation of an adversary hearing held the following morning—about which even the dissenting judge confessed he could "not pretend to be outraged"), which stimulated only a "limited" holding, and rested, even on the original petition, on an "incomplete record on appeal" (quotations from the original decision of the Court of Appeals).

The Decision of the Court of Appeals Is Correct

Manifest in the decision of the Court of Appeals after remand as well as in its original decision is a conclusion according fully with the constitutional guidelines established by this Court. See *Heller* v. *New York*, 413 U.S. 482, 491 (1973).

5. Assuming that adversary hearings are constitutionally required at all. See *Heller* v. *New York*, 413 U.S. 482, 491 (1973).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March, 1974